No. 15033

In The

United States Court of Appeals

For the Ninth Circuit

1956 Term

GILBERT RIPKA and WILSON BROTHERS TRUCK LINES, INC., a corporation,

Appellants,

vs.

CHARLES CREHORE, General Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders,

Appellee.

Appeal from the United States District Court for the District of Arizona.

BRIEF OF APPELLEES

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Appeal from the United States District Court for the District of Arizona.

STATEMENT OF JURISDICTION

This is an action for death resulting from an auto accident. It was originally instituted in the Superior Court of Coconino County, Arizona, by WANEK, then special administrator for the estates of the deceaseds, against RIPKA, driver of the truck which caused the deaths. Petition for removal, accompanied by an affidavit, was duly filed for this defendant by his counsel then and now, MR. MARK WILMER, appropriately and expressly setting forth the diversity of the parties, and it was accordingly removed under 28 U.S.C. § 1441.[1]

[1]The removal details are not shown in the printed Transcript, which begins with the amended complaint; but they are contained in the record on appeal, as supplemented by pleadings added pursuant to appropriate stipulation.

After removal, plaintiff filed an amended complaint adding as a defendant RIPKA'S employer (T.R. 3). Before judgment, CREHORE, a general administrator, was substituted for WANEK as plaintiff (T.R. 34).

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. § 1291.

CONCISE STATEMENT OF THE CASE

A. The Case.

The accident, which is the subject of this action, took place at approximately 3:00 A.M., on July 10, 1954 on U. S. Highway 66, the main arterial east-west highway in northern Arizona at a point some seven and one-half miles west of Flagstaff, Arizona (T.R. 110-111). At that particular point U. S. Highway 66, two lanes in width, begins a sweeping curve to the right (T.R. 239). West of this point the road is almost perfectly straight for a considerable distance (T.R. 239). Immediately east of this point the road enters rolling country which extends to and beyond Flagstaff, Arizona, and the road is winding and hilly (T.R. 110). Plaintiff's intestates were proceeding westerly from Flagstaff, Arizona, in the north lane of travel and, having negotiated the hilly section of the highway, were approaching the end of the last curve before the straight part of the road. The defendants' vehicle was proceeding easterly in the south lane of travel about to enter the first curve (T.R. 341-345). The defendants' vehicle, a large Mack Truck with refrigerated semi-trailer weighing approximately 58,000 pounds never made the curve but proceeded eastbound diagonally across the westbound lane of travel in a straight line to where it came to rest off the north side of the highway (T.R. 240). Plaintiff's proof upon trial was that the truck struck and completely demolished the left front of the plaintiffs' Hudson sedan at a point approximately five feet two inches over the dividing center line in plaintiff's intestates' lane of travel (T.R. 399—Plaintiff's 9 in Evid.). HERBERT NOAH SANDERS was killed in the accident. DELPHIA F. SANDERS was dead on arrival at the Flagstaff

Hospital and their three children with them in the vehicle sustained injuries. The driver of the truck was uninjured.

B. The Dead.

HERBERT NOAH SANDERS was 46 years of age at the time of the accident (T.R. 275). He had resided at Oakland, California, and was a machinist by trade (T.R. 276). Prior to his death he had been employed at Hunter's Point Naval Shipyards as a machinist. His employment was covered by Civil Service and he earned, according to testimony, approximately $2.33 per hour or upwards of $400.00 per month (T.R. 277,—Deposition of Howard Pease, Exhibit 38). In October of 1953 he began taking a night school course to study engineering (T.R. 277). In the day time he worked out of the Machinists' Union Hall and was steadily employed (T.R. 277—Deposition of James Martinez, Exhibit 42). Testimony adduced in the trial by way of deposition showed that he was a steady worker in good health and with a good attendance record. His personal habits were described as thrifty and frugal, and he was devoted to his family (T.R. 293). The decedent had learned of opportunities for obtaining employment as a machinist at White Sands, New Mexico under Civil Service and had taken his family, together with their personal belongings to Las Cruces, New Mexico for the purpose of applying for a job. During the course of his examination for employment it became necessary that he obtain certain Civil Service records regarding his health, from his previous employment at Hunter's Point. On July 9, 1954, the family left New Mexico for California in order to obtain these records from the Naval Shipyard (T.R. 281). The deceased was killed on July 10, 1954, while traveling to California. At the time of his death he had an estimated life expectancy of 23.83 years.

DELPHIA F. SANDERS was the wife of Herbert Sanders, age 39 years. Testimony adduced, showed that she was in good health and shared her husband's habits with regard to frugality and thrift. She supplemented the family income by daily care of other children

(T.R. 292). Mrs. Sanders was dead on arrival at the Flagstaff Hospital. At the time of her death she had an estimated life expectancy of 28.90 years.

Herbert and Delphia Sanders left surviving them four daughters, one married and three minor daughters who lived with them, being age 7, 13 and 17 at the time of the accident.

While the decedents had applied their earnings to raising and educating their family, they had managed to accumulate a 1949 Hudson automobile, a two-wheel trailer, household goods, personal effects and at least $2400.00 in cash before their untimely demise.

C. The Proceedings Below.

The original action was filed within two days after the accident in the state court at Flagstaff, Arizona, by WANEK as administrator of the decedents' estates. It named RIPKA, alleged to be a non-resident, as the defendant and service of process was made upon him before he could leave Flagstaff, Arizona. Thereafter, counsel for the defendant RIPKA filed a verified petition for removal of the action to the United States District Court based on diversity of citizenship, and amount in controversy, alleging WANEK, as administrator of the Estate of HERBERT NOAH SANDERS and DELPHIA F. SANDERS, deceased, was a resident of Arizona and that RIPKA was a resident of Illinois. The affidavit setting forth all of the necessary particulars of jurisdiction in the district court was neither denied nor controverted by plaintiffs and the case was removed to the jurisdiction of the United States District Court. Thereafter, plaintiffs filed an amended complaint adding the defendant WILSON BROTHERS by appropriate pleadings and later the agency between defendant RIPKA and WILSON BROTHERS was admitted.

Trial was held in the United States District Court at Prescott, Arizona. During the trial the defendants objected to the introduction of special letters of administration issued by the Superior Court of Arizona to WANEK. These objections were overruled

by the trial court, which observed that it had found authority for the bringing of an action by a special administrator and that in the event there should be a verdict the court would protect the interests of all parties by withholding entry of judgment until the appointment and qualification of a general administrator (T.R. 305). The jury, after due deliberation, rendered a verdict in favor of plaintiff and against defendants, finding for the estate of HERBERT NOAH SANDERS, $65,000 in damages, and for the estate of DELPHIA F. SANDERS, $18,750 in damages.

Thereafter, and before entry of judgment, plaintiff moved to substitute CREHORE as the duly qualified and acting general administrator of the estates of HERBERT NOAH SANDERS and DELPHIA F. SANDERS which was objected to by the defendants and over-ruled by the court.

Defendants contended in court and Appellants' Brief repeatedly asserts that plaintiff instituted this suit as a general administrator and proved only that he was a special administrator. The original complaint, the amended complaint and the affidavit of defendants' counsel on removal all refer to the plaintiff as administrator without designating him to be "general" or "special".

Judgment was entered in favor of CREHORE as general administrator and against the defendants in the full amount as returned by the verdicts of the jury. Motion for new trial alleging lack of capacity of the special administrator to institute the action, passion and prejudice and errors in admitting and rejecting evidence was filed and over-ruled by the trial court and the within appeal followed.

SUMMARY OF ARGUMENT

I. Jurisdiction.

This action was originally instituted in the Superior Court of the State of Arizona and was thereafter removed to the United States District Court upon the application of the defendant RIPKA, supported by the affidavit of his counsel. Counsel for appellants

now contends for the first time that the necessary diversity has not been proved.

As to RIPKA, the petition for removal establishes diversity. The removal papers were neither controverted nor denied by the plaintiffs and the record does not show that diversity did not in fact exist. The answer of counsel assertedly putting jurisdiction in issue by a general denial is contrary to Federal Rule 8(b) permitting general denial subject to Federal Rule 11, which states that counsel can use a general denial when *and only when* he can in good faith fairly deny all the averments of the opposing party's pleadings. (In this case the general denial is filed by the same counsel who made the oath alleging diversity).

As to WILSON BROTHERS TRUCK LINES, a defendant added after removal, the diversity of citizenship of the parties is expressly admitted.

II. Capacity of the Special Administrator.

The power of a special administrator to maintain the within action arises by virtue of the provisions of the Wrongful Death Statute authorizing such actions to be instituted by a personal representative and is not to be tested by his authority to administer the estate of the decedent generally. In interpreting wrongful death statutes it is generally held that a special administrator is a "personal representative" within the embrace of the statute. In any event the action has been tried on its merits and the defendants were deprived of no defense which they might otherwise have asserted. The general administrator was substituted prior to judgment and judgment was entered in favor of the substituted general administrator against the defendants.

III. Liability.

Although counsel for defendants acknowledge that the court will not retry a fact issue decided by the jury, it appears three pages of the brief are directed to an attempt to show the court that the jury was in error as to liability for whatever value this may

be in supporting counsel's other contention that the verdict of the jury was a result of passion and prejudice. We believe that liability is clearly established by the testimony and physical evidence establishing that the impact took place well over the dividing line of the highway and in plaintiff's intestates' lane of travel.

IV. Damages.

Appellants contend that the size of the verdict reflects that it is the result of lack of understanding and passion, prejudice or sympathy. We believe the general rule to be that the Appellate Court will not review the amount of the verdict returned by the jury, a rule bottomed on the Seventh Amendment of the Constitution, which provides that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 53 S. Ct. 252. Over a period of years a trend, if it may be labeled such, has been developing, the effect of which is to allow the review of certain of these matters by the Appellate Court. Under this authority the Appellate Court does not review the excessiveness of the verdict, but it does review the action of the trial judge which may affect the verdict. Therefore, it may come within the province of the court to review whether or not the trial court abused its discretion in denying the motion for a new trial on the grounds of excessiveness of the verdict. It is worthy to note that the Appellants do not anywhere specifically assign an abuse of the discretion of the trial court in refusing to grant a new trial as error. It is also worthy of note that nowhere in the record does the matter of bias and prejudice affirmatively appear.

The only reference to passion and prejudice is counsel's suggestion in his brief that it arose "upon seeing three orphaned girls in the court room".[2] The record in this respect shows that upon motion of counsel for the defendants the rule was invoked and the daughters were excluded from the court room prior to the com-

[2]Appellants' Brief, page 31.

mencement of the trial. Further, one of the "orphans" was *Mrs.* Fern Schulman.

Finally, the amount of the verdict was not such as might be said to be "monstrous" or "grossly excessive" as stated in the federal cases,[3] or "flagrantly outrageous and extravagant" as stated by the Arizona Supreme Court.[4]

In view of the suggestion that the jury was out of hand as to liability and damages[5] and that the jury ignored the court's statement of the law.[6] the Court is respectfully reminded of the admonition of the United States Supreme Court found in *Fairmount Glass Works v. Cub Fork Coal Co.* (supra), stating:

> "Appellate courts should be slow to impute to juries a disgard of their duties and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

ARGUMENT

I. Jurisdiction.

This is a removed action sounding in diversity under 28 U.S.C. §1441. Under Federal Rule 81(c), the plaintiff was free to amend to add additional parties, and no question of his right to do so is raised.

However, the defendants do now contend that the necessary diversity, in a suit removed at their behest, is not duly shown. We, therefore, refer to the key facts:

(1) As noted in the statement above concerning jurisdiction, this suit was removed at the petition of the defendant RIPKA, alleging diversity in all necessary particularity and supported on the critical point by Mr. Wilmer's oath.

(2) The amended complaint alleged that WANEK was a citizen of Arizona (T.R. 1); that the defendant RIPKA was a citizen of the State of Indiana (T.R. 1) and that the defendant corpora-

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[3]**Southern Pac. Co. v. Guthrie,** 186 F. 2d. 926.
[4]**Stallcup v. Rathburn,** 76 Ariz. 63, 258 P. 2d. 821-823.
[5]Appellants' Brief, page 29.
[6]Appellants' Brief, page 31.

tion was incorporated in Missouri (T.R. 2). The defendant RIPKA, through Mr. Wilmer, did not deny the allegation as to the citizenship of the parties, but did allege that he was without knowledge sufficient to form a belief as to the matter contained in the paragraph of which this allegation was a part (T.R. 8). The defendant company, through Mr. Wilmer, admitted the allegation as to citizenship (T.R. 13, 14).

(3) The plaintiff offered in evidence certified copies of his letters of administration from an Arizona Court, letters which by law could only issue to a citizen of Arizona. A.C. 1939 §38-404[7]. The trial judge twice advised the jury that plaintiff "lives in" Flagstaff, Arizona (T.R. 49, 53).[8]

Defendants "suggest"[9] that some more direct proof of diversity was required than was here offered. Nothing more was required because:

(a) The defendant WILSON BROTHERS, added after the removal, expressly admitted the citizenship of the parties. Plaintiff is put to an invariable burden of proof only where his "allegations of jurisdictional facts are challenged by the defendant," *Thomson v. Gaskill,* 315 U.S. 442, 446, 62 S. Ct. 673, 86 L. Ed. 951 (1942). If the proper allegations are made and *challenged by the defendant,* plaintiff must prove them, *McNutt v. General Motors Accep. Corp.,* 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); but otherwise he is put to his proof if, but only if, the court itself has doubts; *ibid.* Such doubts the court below expressly did not have. The defendants are undoubtedly correct in asserting that the parties cannot establish jurisdiction by consent;

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[7]This section is taken from the California law, Deering. Cal. Code Ann. Probate, § 420.

[8]Presumably he either took judicial notice of this fact, since Mr. Wanek was an attorney duly licensed under the State Bar Act., A.C. 1939 § 32-301, *et seq.*; or he took it from the removal papers.

[9]This being all they can do under Federal Rule 12(h), since insofar as it is within their limited power to do so, the defense has been waived, though the court itself, of course, may raise the question.

but on the other hand, a plaintiff is not required to make proof which neither the defendant nor the court asks of him. "If the defendant attacks the allegation of jurisdiction, the burden is on the plaintiff to support it," 2 *Moore, Fed. Prac.* 1639; but normally, where the allegations are not challenged and there is nothing on the face of the record to cause doubt of jurisdiction, the court will not inquire *sua sponte. Gibbs v. Buck,* 307 U.S. 66, 71-72, 59 S. Ct. 725, 83 L. Ed. 111 (1939).

(b) If more were to be required than the pleadings, it has been furnished by the proof of administration.

(c) As to RIPKA, the petition for removal establishes the diversity. The petition is a part of the record which concludes the question of jurisdicition until some substantial issue is raised by a counter pleading or by the court itself. *Phoenix Ins. Co. v. Pechner,* 95 U.S. 183, 24 L. Ed. 427 (1877). The leading case in which Appellants themselves rely, *Mansfield etc. R. Co. v. Swan,* 111 U.S. 379, 28 L. Ed. 462 (1884), shows that an unchallenged petition is a proper source from which to determine diversity; and jurisdiction is abundantly there shown in this case. The defendant who removes has the burden of establishing diversity where plaintiff denies it. *2 Cyc. Fed. Prac.,* 3d. Ed. 443.

In this case the jurisdictional allegations contained in defendant's petition to remove and supporting affidavit were not denied or controverted by plaintiff. Plaintiff filed no petition for remand of affidavit controverting the sworn statements of defendant RIPKA'S counsel. Plaintiff could not and has not denied diversity and neither defendant RIPKA or his counsel has to date, or can, suggest that diversity of citizenship does not in fact exist. The removal papers are sufficient. *Chicago & U.W.R. Co. v. Ohle,* 117 U.S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886); *Doggett v. Hunt,* 93 F. Supp. 426 (S.D. Ala., 1950). Granting that want of jurisdiction is never waivable if it is made to appear that there was not in fact diversity of citizenship between the plaintiff and defendant RIPKA, nowhere in the record is there any evidence that the

averments in the affidavit of defendant's counsel, establishing diversity, are false.

(d) Finally, as to RIPKA, the answer which assertedly puts jurisdiction into issue by a general denial of information was filed by the same counsel who on oath at the time of the removal had alleged the citizenship of these very parties, and who also filed an answer for the corporate defendant admitting the citizenship and incorporation of the parties. Federal Rule 8(b), permitting allegation of want of information and belief to serve as a denial, is expressly made subject to Federal Rule 11, "which means that counsel can use a general denial when, *and only when,* he can in good faith fairly deny all the averments of the opposing party's pleadings." 2 *Moore, Fed. Prac.* 2103 (2d Ed.).[10] This limitation is expressly emphasized by the rule in respect to denials of jurisdiction.

In the circumstances, the case calls for application of the rule that "if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient." *Sun Printing & Publ. Co. v. Edwards,* 194 U.S. 377, 382, 24 S. Ct. 696, 48 L. Ed. 1027 (1904). In this case the admission in the companion answer; the proof of administration; the petition for removal; or any of them, should be enough.

It but remains to say that the substitution of CREHORE for WANEK does not change the jurisdictional situation; the jurisdiction is settled by the original parties. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 295, n. 28, and cases there cited; 58 S. Ct. 586, 82 L. Ed. 845 (1938).

II. The Special Administrator Had Power to Institute Action.

Appellants contend that a special administrator, as distinguished from a general administrator, had no authority to maintain this

[10]We do not mean even remotely to impute bad faith to the distinguished defense counsel. The general denial went to a long paragraph, of which the citizenship allegations were a very incidental part.

action. The argument is made in the alternative — either (a) the order of appointment granted no such power, and it is therefore lacking; or (b) a special administrator is not a "personal representative" under the statute pertaining to wrongful death actions. Neither point is well taken. Not merely was it appropriate that the action be brought by a special administrator under Arizona law, but it may even have been imperative; for the action had to be brought quickly, as it was, before the driver might leave the jurisdiction; and for such speedy action, a special administrator was particularly appropriate.[11]

In support of the first alternative Appellants cite numerous Texas cases which presumably uphold their point of view. These Texas cases, however, are wholly distinguishable, arising under a special Texas Statute regarding the power of special administrators, which reads as follows:

> "Temporary administrators shall have and exercise only such rights and powers, as are specifically expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void."
>
> *Vernon's Tex. Civ. Stat.* 3379.

The remaining cases cited to the court deal with unrelated matters, such as the authority of a special administrator to pay debts, or approve claims for services — matters having nothing to do with the power to institute actions for wrongful death.[12]

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[11]The appointment of a special administrator may be made at any time and without notice (§ 38-602, A.C. 1939). Notice of hearing on a petition for appointment of a general administrator shall be given by publication— if in a weekly for at least three weeks (§ 38-406, A.C. 1939, Supp. 1952).

[12]**Vaught v. Struble,** 65 Ida. 26, 139 P. 2d 456, involved the speculation by a special administrator with warehouse receipts; **Little v. Gavin,** 244 Ala. 156, 12 So. 2d. 549, involved the filing of an action by a special adminstrator after removal of the estate proceedings to the circuit court in equity; **Ex Parte Kelly,** 243 Ala. 184, 8 So. 2d. 855; **Arendale v. Johnson,** 206 Ala. 245, 89 So. 603, and **Mitchell v. Parker,** 227 Ala. 676, 151 So. 842, all involved the capacity of a special administrator to maintain actions for the collection and preservation of estate assets.

In support of the second alternative no cases are cited to support Appellants' premise that a special administrator is not a "personal representative" under statutes pertaining to wrongful death.

This action was instituted by the administrator in accordance with §31-102, A.C. 1939 (The Arizona Code in effect at the time of the accident), the material portions of which provide:

> "Every such action shall be brought by and in the name of the personal representative of such deceased person, . . . The term 'personal representative' as used in this section shall be construed to include any person to whom letters testamentary or of administration have been granted by competent authority under the laws of this or any other state, and such action may be maintained by any such personal representative without the issuance of any further letters, or other requirement or authorization of law; . . ."

The issue is whether a special administrator is a "personal representative" as is required by the statute.

While there is no Arizona case directly in point (and none is cited by Appellants), the statute is common to many jurisdictions and such statutes have, in overwhelming degree, been interpreted as allowing actions by a special administrator.

We remind the court that the power to maintain the action flows from the wrongful death statute and not from the probate statute, and the power is therefore not to be tested by plaintiff's authority to administer the estate of the decedents. The point is well developed in *Henkel v. Hood,* 49 N.M. 45, 156 P. 2d 790, 791 (1945):

> "Since the character of plaintiff as a personal representative under our statute is entirely foreign to and unconnected with his character as estate administrator, whatever authority he might have as such administrator is unimportant; and, since *his authority to bring and maintain the action flows from the wrongful death statute itself and not from the probate, or estate, laws of this or any other state,* it is incorrect to say that his power to sue in this connection should be tested by his authority to administer generally the estate of the deceased in the state issuing the letters." (Emphasis supplied)

See also *Dominguez v. Galindo,* 122 C.A. 2d 76, 264 P. 2d. 213, 216 (1953), declaring that the provisions of the probate code relating to special administrators "do not now and never have concerned themselves with the authority of the personal representative of a decedent to bring a death action" as provided in the survival of actions statute; and further noting that the survival provision "in turn, has never sought to distinguish between administrators with general powers and those having special powers only." See also *Jones v. Minnesota Transfer Ry. Co.,* 108 Minn. 29, 121 N.W. 606, 607 (1909), and cases there cited, holding the power of the personal representative to sue in a similar situation is "without reference to his powers and duties under the statute regulating the administration of the estates of decedents." The point is very bluntly made in *Swan v. Norvell,* 107 Wisc. 625, 83 N.W. 934 (1900), holding that while there may be "serious doubt" as to whether a special administrator can bring an action such as this under the probate provisions, "we can entertain no doubt that he is empowered to do so by the provisions of the survival of actions statute." The court added, "that a special administrator is the 'personal representative' of the deceased so long as he continues in office is not open to argument or doubt."

As the foregoing cases suggest, the term "personal representative" used in wrongful death statutes includes ancilliary, temporary and special administrators, as well as general administrators and executors. In addition to express holdings on this subject, in *Henkel v. Hood, Dominguez v. Galindo, Jones v. Minnesota Transfer Ry. Co.,* and *Swan v. Norvell,* all cited and quoted *Supra,* see also *Keys v. Pennsylvania R. Co.,* 158 Ohio St. 362, 109 N.E. 2d. 503, 505 (1952):

> "According to the weight of authority, the term 'personal representative', as used in wrongful death statutes, is generally considered broad enough to include a temporary, special or ancillary administrator or executor."

Nickles v. Wood, 221 Ark. 630, 255 S.W. 2d. 433, 436 (1953);

Brooks v. Sessoms, 53 Ga. 453, 186 S.E. 456 (1936).

The point is concisely made in *Wilson v. Pollard,* 190 Ga. 74, 8 S.E. 2d. 380 (1940):

> "The word 'administrator' as used in the statute is unrestricted and unlimited. It necessarily follows that any administrator is included, and therefore that a temporary administrator is a proper party to bring suit under the code section 105-1309."[13]

In summary, it was completely appropriate for the special administrator to institute this action. Cases cited in an attempt to limit the powers of the special administrator in this regard either come from Texas, which has a special statute which does exclude the practice, but which does not exist in Arizona, or deal with matters other than suits by administrators. The cases substantially uniformly hold that a special administrator may bring such an action, not by virtue of the probate code but by the wrongful death statute. The course of action followed below was conventional and proper. In any event the case has been tried on its merits and the defendants have been deprived of no defense they might otherwise have asserted. *Stanolind Oil & Gas Co. v. Jamison,* 204 Okla. 93, 227 P. 2nd, 404, 408.

III. Liability.

We note with no small degree of surprise that Appellants have seen fit to inject the question of liability into their Brief on Appeal. Despite the fact that liability is not assigned as error — was not designated as a point to be relied upon upon appeal under Federal Rule 75(e) — and that counsel acknowledged that the court will not retry the issue of liability which the jury has resolved against the Appellants, approximately three pages of the brief are devoted to what is clearly an argument against liability.

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[13]In this case a general administrator was substituted for a special administrator before judgment. No exception is taken to this aspect of the matter here; and we therefore merely note in passing that such a practice is proper. **Reyburn v. Young,** 219 Cal. 536, 28 P. 2d. 353 (1933); **Stanolind Oil & Gas Co. v. Jamison,** 204 Okl. 93, 227 P. 2d. 404 (1951).

Since counsel has raised this matter, we do not feel we may ignore it completely, suffice it to say however:

(1) The accident took place on a curve (T.R. 240 and Plaintiff's Exhibits 19 and 19A).

(2) Plaintiff's intestates were west bound in the north lane of travel, making a curve to their left and Defendants vehicle was east bound in the south lane of travel (T.R. 341-345). West of the point of the accident the highway is straight and level (T.R. 250). East of the point of the accident the highway enters rolling country and is winding and hilly (T.R. 110, 250).

(3) A straight line drawn down Defendant's lane of travel would cross the center line into Plaintiff's intestates' lane and would end where the Defendants' truck came to rest off the north side of the highway (T.R. 240).

(4) All of the debris, gouges and other physical evidence of impact were found on the north side of the center line and in the plaintiff's intestates' lane of travel (conceded by counsel—Appellants' Brief, 27).

(5) Plaintiff's intestates' vehicle was struck on the left front and the left front of Defendants' Mack truck was substantially damaged (T.R. 30), despite the fact that Appellants argue in their brief that it was uninjured (Appellants' Brief, 29).

(6) The investigating officer, an Arizona Highway Patrolman, Defendants' witness, testified under oath in the Coroner's inquest that *"the point of impact where both vehicles met was five feet two inches in the west bound lane of traffic, in the Sanders' lane"* (T.R. 399).

While we do not wish to pursue the matter of liability unnecessarily, we believe that this much of a showing is necessary in view of counsel's suggestion in his brief that the jury was out of hand as to liability and the statement that liability was in sharp dispute. We do not wish the Court to be left with the suggestion that the jury did not carefully and conscientiously carry out their duties.

IV. Verdicts.

Appellants' final contention is that the trial court erred in refusing to grant Appellants' motion for new trial, contending the verdicts are excessive and the result of passion, prejudice or sympathy on the part of the jury.

Appellee believes it is significant that nowhere in Appellants' Brief is it specifically charged that the trial court was guilty of an "abuse of discretion" in denying Appellants' motion for a new trial for claimed excessiveness of the two verdicts. Though it is assigned by the Appellants that the court erred in refusing to grant Appellants' motion for a new trial on the ground that the verdicts were motivated by passion or prejudice, Appellants' attack here is based on an "excessiveness" rather than "an abuse of discretion" rationale.

It is well settled that it is for the trial court to grant a new trial on the ground that the verdict is excessive. The court's action thereon is not subject to review here except for an *abuse of discretion* by the trial court in not setting the verdict aside, and an abuse of discretion is not specifically assigned as error. *Southern R. Co. v. Wilson,* (4 Cir. 1954) 213 F. 2d. 870; *Southern Pacific Co. v. Guthrie,* (9 Cir. 1949) 180 F. 2d. 295, id. 186 F. 2d. 926; *Chicago Rock Island v. Kifer,* (10 Cir. 1954) 216 F. 2d. 753; *Hulett v. Brinson,* (U.S.C.A., D.C. 1955), 229 F. 2d. 22; *Glendenning Motorways v. Anderson,* (8 Cir. 1954), 213 F. 2d. 432.

The rule limiting the scope of review of the "excessive verdict" issue is bottomed on the Seventh Amendment which provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law. Review must be upon the legal aspects of the proofs as distinguished from a jury question of fact (in this case the amount of damages). As summarized in *Chicago Rock Island & Pacific Railway v. Kifer,* (Supra at page 756), the rule now pretty well settled in all the circuits is stated as follows:

"The Railroad Company urges that the verdict was excessive and that the trial court abused its discretion in not granting a new trial on that ground. A Circuit Court of Appeals may not review the action of a District Court in granting a motion for a new trial on the ground the damages awarded by the jury were excessive, because that is an error of fact. *Our province is limited to determining whether the trial court in denying the motion, abused its discretion....*" (Emphasis Supplied)

Assuming, however, the question of the amount of the awards by the jury to be properly before this Court for review on the issue of abuse by the trial court in denying Appellants' motion for new trial, it is first necessary to more fully consider the measure of damages in wrongful death actions in Arizona.

The single statutory provision relating to the measure of damages for wrongful death in the State of Arizona provides:

"In every such case the jury shall give such damages as they deem fair and just and the amount so recovered shall not be subject to any debts or liabilities of the deceased."

§ 31-103, A.C. 1939.

As pointed out by Appellants, the action is held to be for the benefit of the estates of the decedents and that the jury shall be given the instruction, as was done in this case, that as a measure it shall apply the present value of the probable accumulations of the deceased considering health, earning capacity, character and other factors relating to probable accumulations. At the same time the Arizona courts have without exception taken cognizance of the mandate of the foregoing statute, recognizing with particularity that the laws of Arizona have delegated the responsibility for the amount of the award to the jury. For example in *Arizona Binghampton Copper Co. v. Dixon* (1921), 22 Ariz. 163, 178, 195 P. 538, cited by Appellants, the Arizona court, approving the instruction that the measure of damages in such cases is the present value of the probable accumulations of the deceased, and that the jury award such damages as are fair and just, said:

"The statute seems to place the duty of arriving at this amount solely upon the jury with one admonition that they 'shall give such damages as are fair and just' . . . His life might have proved to be worth more or less than the verdict. We cannot say."

Similarly in *Keefe v. Jacobo,* (1936), 47 Ariz. 162, 54 P. 2nd. 270, 272:

"There is no complaint of the instructions on the measure of damages. The jury, in possession of proper rules to guide it, arrived at the conclusion that the deceased's estate by reason of his wrongful death, had suffered damages in the sum of $5,000. Deceased was a common laborer, 35 years of age, earning from $30 to $40 per month and a steady worker. His expectancy was 31 years. The present value of his earning power over a period of 31 years might or might not amount to the sum of $5,000. It was for the jury to say."

Further in *City of Phoenix v. Mayfield,* (1933), 41 Ariz. 537, 20 P. 2d. 296, 301, again in an action for wrongful death and claimed excessiveness in an award of $10,000 for the wrongful death of a 24 year old waitress with two children, it is said:

"Just what value she (decedent) might have been to her estate is of course problematical. Her accumulations might have been small or considerable. The measure of damages in such a case cannot be definitely or at all accurately estimated. It was for the jury in view of all the facts and circumstances, to determine how much her estate suffered by reason of her untimely death. We cannot say as a matter of law, that the verdict is excessive, or that because it seems large, the jury was actuated by prejudice and passion. An examination of the decided cases in other jurisdictions show the courts are unwilling to disturb the verdict of the jury merely because they might have given under the same circumstances a much smaller verdict."

In the history of both the Territory and the State of Arizona, a total of ten appeals on this point have been taken to the Arizona appellate court. In every case it was assigned as error that the verdict was excessive, claiming passion, prejudice or sympathy on

the part of the jury. In every case the award of the jury was affirmed.[14]

The rule is well settled in the Federal Courts of Appeal and in this Circuit, that its power is not as broad as that of the trial court. As expressed by this court in its recent opinion of May 23, 1956, *P. W. Siebrand, et al. v. George F. Gossnell, et al.,* Opinion No. 14,468, (not yet reported) absent, a total want of evidence in all or any part of the case, or the erroneous exclusion from consideration by the trial court of appropriate matters, or a showing of bias or prejudice on the part of the jury, the circuit court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous, following Southern Pacific Co. v. Guthrie (Supra). This too is the rule in Arizona.[15]

Appellant urges the adoption of a "reasonable man" rule as the test to be applied by the circuit court in reviewing the verdicts. The law is settled quite to the contrary. In a tort action the question of excessiveness of a verdict is a question to be determined by the trial court and cannot be considered as a ground for reversal unless it affirmatively appears that it resulted from bias, prejudice or passion in that the verdict can be said to be "monstrous" or

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[14](1906) So. Pac. Co. v. Wilson, 85 P. 401, 10 Ariz. 162; (1907) DeAmado v. Freidman, 89 P. 588, 11 Ariz. 56; (1910) Phoenix Ry. Co. v. Landis, 108 P. 247, 13 Ariz. 80; Rehearing (1911) 112 P. 844, 13 Ariz. 279, Affirmed (1913) 231 U.S. 578; (1920) Inspiration Con. Cop. Co. v. Conwell, 190 P. 88, 21 Ariz. 480; (1921) Pacific G. & E. Co. v. Almanzo, 198 P. 457, 22 Ariz. 431; (1921) Arizona Binghampton Cop. Co. v. Dixon, 195 P. 538, 22 Ariz. 163; (1929) Inspiraation Con. Cop. Co. v. Bryan, 276 P. 846, 35 Ariz. 285; (1933) City of Phoenix v. Mayfield, 20 P. 2d. 296, 41 Ariz. 537; (1936) Keefe v. Jacobo, 54 P. 2d. 270, 47 Ariz. 162; (1938) Western Truck Lines v. Berry, 78 P. 2d. 997, 52 Ariz. 38.

[15]Footnote from Siebrand, et al v. George F. Gossnell, et al, above, page 17, printed opinion: "Arizona law is generally in accord, and differentiates between a verdict influenced by passion and prejudice and one that is merely excessive, Stallcup v. Rathburn (1953) 76 Ariz. 63, 258 Pac 2d. 821, 823. . . . The excessive verdict must be 'flagrantly outrageous and extravagant,' Stallcup (supra p. 824) before the Arizona Appellate Court will set it aside."

such as "shocks the judicial conscience". *Southern Pac. v. Guthrie* (Supra); *Siebrand v. Gossnell* (Supra); *Glendenning Motorways v. Anderson* (Supra); *Atlantic Coast Line R. Co. v. Pidd,* (5 Cir. 1952), 197 F. 2d. 153; *Ballard v. Forbes,* (1 Cir. 1954), 208 F. 2d. 883. None of such elements are present in this case.

Appellants cite in support of their "reasonable man" doctrine, *Bucher v. Kraus,* (7 Cir.) 200 F. 2d. 576 and *Virginian Ry. Co. v. Armentrout,* (4 Cir.) 166 F. 2d. 400. However Appellee finds these two cases only approve the rule this court may with propriety ascertain whether the trial court abused its discretion in failing to grant a new trial. In the same connection Appellants further cite *Brabham v. State of Mississippi* (5 Cir.) 96 F. 2d. 210. We find this 5th Circuit Case to hold that the verdict found to have been made execessive by passion and prejudice springing from indulgence in the jury room in such feelings, may not be cured by remittitur but only by a new trial. We do not find in this case any "reasonable man" rule as to the scope of the review applicable to the issue before this court. Appellants cite *Ford Motor Co. v. Mahone* (4 Cir.) 205 F. 2d. 267, wherein the jury had awarded a woman $234,330.00 damages for personal injuries. The trial judge then required a remittitur of the amount exceeding $135,000.00 as a condition of allowing the verdict to stand. This case holds that while the granting of a new trial on the ground that the verdict was excessive or that a juror was guilty of misconduct ordinarily rests in the trial judge's sound discretion, where the verdict was found by the *trial judge* to be unreasonable and grossly excessive, then he was guilty of an abuse of discretion in not granting a new trial, especially when such finding by the trial judge is coupled with a finding of partisanship of one of the jurors. We submit this case too is strictly in line with the rule in this Circuit as to the test for review when excessiveness of the verdict is assigned as error.

The remaining authority cited by Appellants in support of Appellants' "reasonable man" doctrine is *Trowbridge v. Abrasive*

Co. (3 Cir.) 190 F. 2d. 825, an action for personal injuries wherein a 44 year old plaintiff was awarded a verdict of $126,182.24 for permanent and total disability. Appellant there contended that the amount of the verdict was so "shockingly" excessive as to warrant granting of a new trial. On this point the court said (P.830):

> "We need not decide, however, whether the verdict is excessive, for this court will not substitute its judgment for that of the jury or the trial court. The question of excessiveness of a verdict is primarily one for the trial court; where, however, the verdict is grossly excessive, the denial by the trial court of a motion for a new trial constitutes such an abuse of discretion that this court will remand the cause for a new trial. A careful study of the evidence of damages in the record has failed to convince us that the verdict was so grossly excessive as to justify reversal on this ground."

Appellee believes it is appropriate to point out that the Trowbridge case is not authority for any rule different than that repeatedly and currently approved in this Circuit on the question of excessiveness of the verdict. It is a question to be decided by the trial court and cannot be ground for reversal unless it affirmatively appears it resulted from bias, prejudice or passion in that the verdict can be said to be "monstrous" or such as "shocks the judicial conscience".

This court took cognizance in *Southern Pacific v. Guthrie* (Supra), that there is an impressive list of cases, including the Supreme Court, holding the Appellate Court will not review a judgment for excessiveness of damages even in cases where the amount of the damages is capable of much more precise ascertainment than in a personal injury case. Granted the scope of the review has been expanded, it is settled in this circuit at least. This court has not, however, at any time suggested, as do Appellants, that the adequacy or excessiveness of an award of a jury in tort actions is to be tested in the light of whether "reasonable men" would otherwise conclude. This would indeed, we believe, be contrary to all of the decisions in this circuit and probably elsewhere.

The record contains no proof of any appeals to passion or prejudice in this case. Appellants, however, in argument suggest passion was engendered by the "three orphaned girls in the court room", referring to the daughters of the decedents. We are sure this court is not unmindful that some proof of appeal to passion or prejudice has been held essential by some authorities before it may be found other than from the mere size of the verdict. *Larson v. Chicago N.W.A.R. Co.* (7 Cir.) 172 F. 2d. 841, 845.

Appellants' reference to the presence of the daughters in the court room is misleading. The youngest daughter, Linda Sanders was never in the court room and for that matter never in the court house. The three older daughters of the decedents, Norma Sanders, Wanda Sanders and Mrs. Fern Schulman, were sworn as witnesses at the outset of the trial, together with other witnesses then present and were thereupon excluded by the court from the court room (T.R. 17). Norma Sanders at the time of the trial was a grown woman approaching her twentieth birthday (T.R. 275). Wanda Sanders was then seventeen years of age (T.R. 298). Mrs. Fern Schulman, who was not called as a witness, is obviously an adult, married woman. Appellants neither suggest or contend that there is any other basis in the record tending to show an appeal to passion and prejudice.

In this case, the decedent HERBERT NOAH SANDERS, a machinist and as an employee of Hunter's Point Naval Shipyards until a reduction in force in October of 1953,[16] was a steady and studious worker,[17] did not drink,[16 18 19 20] was cooperative with with other personnel,[16] his character was excellent, his health was good and his attendance record at work was very good.[17] Sanders had advanced to the third step in the pay scale and at this work was paid $2.33 per hour.[16] After the reduction of the force in employees at Hunter's Point Naval Shipyards, Sanders worked

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[16]Deposition Howard Pease, Plaintiff's Exhibit 38, p. 6;
[17]Deposition Howard Pease, Plaintiff's Exhibit 38, p. 7;

out of the Union Hall and worked every working day (T.R. 293.)[18] Having accumulated time in the Federal Civil Service, shortly before his untimely death, he heard of an opening at White Sands, New Mexico, with an opportunity to return to Civil Service. He considered it desirable to get back into Civil Service in order to secure retirement and other benefits (T.R. 278). That Sanders was not only ambitious for the betterment of his earning potential, but probably would have achieved greater potentials, is attested to by the fact of his attendance at night school after leaving the work at Hunter's Point, taking courses in engineering (T.R. 277). Sanders was a very active and vigorous man.[21] His life was closely indentified with his family and family projects [17 22 23 24 25] He was known to enjoy good health, not only at his work but in and about his home and neighborhood (T.R. 239)[18 24 25] Sanders was obviously a man with ambition, having started at road construction work in Missouri, then coming west, working in a factory in Sacramento, California, then as machinist, first in the Moore Shipyards, then at Bethlehem, and then at Columbia Steel as a millwright for three years (T.R. 276). The only conflict in the testimony raising even a suspicion as to the good health of the decedent was from the testimony of Appellants' witness who examined Sanders for employment at White Sands. This witness stated that he had some physical findings "suggestive" of tuberculosis, but that it was not his duty to make a diagnosis (T.R. 321). It was a matter of common knowledge within the family that HERBERT NOAH SANDERS had pneumonia when he was quite young, that it left scar tissue and that Sanders had repeatedly had the experience of doctors raising the question as to

[18]Deposition James Martinez, Plaintiff's Exhibit 42, p. 10;

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[19]Deposition James Martinez, Plaintiff's Exhibit 42, p. 6.
[20]Deposition Eleanor Onstadt, Plaintiff's Exhibit 41, p. 8.
[21]Deposition James Martinez, Plaintiff's Exhibit 42, p. 18.
[22]Deposition James Martinez, Plaintiff's Exhibit 42, pgs. 7, 8, 19.
[23]Deposition Eleanor Onstadt, Plaintiff's Exhibit 41, p. 11.
[24]Deposition Marilyn Tulley, plaintiff's Exhibit 39, pgs. 10, 11, 12, 16.
[25]Deposition Marilyn Tulley, plaintiff's Exhibit 39, p. 15.

the nature of the scar tissue resulting from the pneumonia (T.R. 280). This witness after first denying under oath, later admitted upon cross examination that as a part of the record of his examination he was told by Sanders that he had had an old pneumonia (T.R. 324). Insofar as any question of the health of the decedent was concerned, the conflict was for the jury and it appears rather conclusively that the jury found more credibility in the testimony of Appellee's witnesses on this score.

The life expectancy of the decedent HERBERT NOAH SANDERS was solely the province of the jury to determine. The jury may well have taken into account increasing prospertiy and the ever increasing life span and period of productivity. Quite properly the trial court instructed upon the subject of life expectancy and without objection by Appellants, as follows:

> "According to the American Experience Table of Mortality, as it has been read into evidence, the expectancy of life of one aged forty-six years, is twenty-three and eighty-one one-hundredths years. And the expectancy of one aged thirty-nine years, is twenty-eight and ninety-one one-hundredths years. This table is to be considered by you, in arriving at the amount of damages, if you find that the plaintiffs are entitled to recover in the action. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable, average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. Therefore, the inference that may be drawn from the tables, applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question."

Appellants would substitute their own firm calculation of the expectancy of life of the deceased, and their own conclusion as to the future earning power and accumulations of HERBERT NOAH SANDERS, for that of the jury or would seek that this Court make

such substitution. The jury had the right to take into account not only the amount of money acquired by both these people until the time of their demise, but also to consider the amount they were capable of earning and saving. This was peculiarly their province. Appellants overlook that since 1940, and in fact even since the trial of the case a year ago, earning power has generally increased as well as the prosperity of the country and the life expectancy of its people. This is an era when not only professional people, but workingmen own their own homes, invest in the stock market and accumulate substantial property interests. Who can say that the twelve businessmen composing the jury were guilty of passion and prejudice if they took these factors into account in arriving at their verdict. The judicial conscience cannot be "shocked" or find "monstrosity" in an award of $63,000 under these circumstances.

No question was raised at to the good health, good habits, frugality and industry of the decedent DELPHIA SANDERS. She was thrifty and thought twice about spending money.[26] Throughout her 39 years Mrs. Sanders had displayed her capabilities of performing well and thoroughly the work to which she had thus far addressed her life, as wife, housekeeper and mother of four daughters (T.R. 294). Her family was growing up, and with her habits of industry and good health, it was for the jury to estimate her probable future earning potential. Even while rearing four daughters she found time to give care to children of other people to supplement the family funds (T.R. 292).[27] [28] A woman capable of caring for this family through its growing years certainly had the ability to earn as much as an elevator operator, bus driver or clerk, jobs which many women occupy today. It was for the jury to estimate what her potential and probabilities were in that or other types of gainful employment. It must not be overlooked that the residences of the decedents have been in those jurisdictions

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[26]Deposition James Martinez, Plaintiff's Exhibit 42, p. 12.

[27]Deposition Mildred M. Saunders, Plaintiff's Exhibit 43, p. 9.

[28]Deposition Marilyn Tulley, Plaintiff's Exhibit 39, p. 7.

having a community property status for accumulations of husbands and wives. It was logical, reasonable and fair for the jury to have presumed, as a matter of common knowledge, that in all probability the expectancy of DELPHIA SANDERS would exceed that of her husband, and that in her declining years, after the death of her husband, her income would have been less, resulting in utilization of some of her capital and that the loss to her estate ultimately would have been far less than that of her husband. The award for her loss in the amount of $18,750 under these facts and circumstances cannot be said to be either "monstrous" or "shocking to the judicial conscience."

Appellants admit the jury was in possession of all proper rules to guide it. The Arizona Statute (§ 31-103, A.C. 1939, supra) on the measure of damages in wrongful death actions, as said by the Arizona Supreme Court in *Arizona Binghampton Copper Co. v. Dixon,* (Supra), places the duty of arriving at the amount solely upon the jury with one admonition, that they "shall give such damages as are fair and just." The Honorable James A. Walsh, trial judge heard fully Appellants' motion for new trial on the grounds that the verdicts were excessive and based on passion and prejudice, and in the light of all of the evidence and applicable law found the motion without merit. The record is devoid of any appeals to passion or prejudice, and the record does not support the charge that the amount of either verdict is so monstrous or grossly excessive that it should be held that the trial judge was guilty of abuse of discretion.

One other matter is raised by Appellants at the outset but it appears to have been abandoned by them in their argument and conclusion as to the points relied upon in their appeal. Appellants state that an error exists by reason of the failure of the plaintiff below to offer any actuarial evidence as to the measure of damages. No case or authority whatsoever is cited by Appellants in support of Appellants' statement. Appellants requested no instruction in

this connection and made no objection to any instruction as to the measure of damages. As we have pointed out, the jury was fully advised as to the factors to be taken into account in determining the issue of future probable accumulations. Had Appellee offered expert testimony as to a calculation of the measure of damages, surely such testimony would have been inadmissible as constituting an invasion of the province of the jury.

CONCLUSION

1. Appellants now contend that the necessary diversity has not been duly shown. There is no showing in the record that the necessary diversity did not in fact exist, only the allegation that it was not proved. With respect to the alleged failure of proof as to the defendant RIPKA, counsel's affidavit on removal alleges diversity in all necessary particulars, and the affidavit was neither denied nor controverted by the plaintiff. We believe no further proof is required nor can it be said that the allegations of diversity have been placed in issue by a general denial of citizenship filed by counsel after removing the cause. The answer of the defendant, WILSON BROTHERS expressly admits the citizenship of the parties.

2. The authority of a special administrator to maintain this action flows from the express provisions of the wrongful death statute giving the cause of action to the "personal representative" of the deceased, which term necessarily includes a special administrator and his authority to maintain the action is not to be tested by his authority to generally administer the estates of the decedents.

3. The trial court's action in refusing to grant Appellants' motion for a new trial for claimed excessiveness of the two verdicts is not subject to review in the Circuit Court, except for a finding of an abuse of discretion by the trial court in not setting the verdict aside, and an abuse of discretion is not here assigned or made out by the record. If properly before the court, the question of

excessiveness of the verdicts is to be determined by the trial court and cannot be considered as a ground for reversal unless it affirmatively appears that it resulted from bias, prejudice or passion in that the verdicts can be said to be "monstrous" or such as "shocks the judicial conscience." None of such elements are present in this case.

We submit that the specifications of error are without merit and that the judgement of the trial court should be affirmed.

Respectfully submitted,

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